miscarriage of justice. It has been said that the Court "must not be over ready to set aside awards where the parties agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding." Russell on the the **Law of Arbitration** 20 Edn. page 410. I find nothing radically wrong in the proceeding before the arbitrator.

I was satisfied that in the circumstances of the present case, the proper order was to remit the matter to the arbitrator for his reconsideration.

For the reasons I have already stated, I made the order as stated above.

LIM JOO THONG

v.

KOPERASI SERBAGUNA TAIPING BARAT BERHAD

HIGH COURT, TAIPING
DATO' HJ ABDUL MALIK BIN HJ ISHAK JC
[ORIGINATING SUMMONS NO. 24-262-1993]
6 JUNE 1994

ARBITRATION: Arbitration Award - Setting aside - Procedures - Application to set aside award made by way of affirmation of affidavit - Whether proper - Whether application to be by way of originating motion - Application made four months after making of award - Whether out of time - Rules of the High Court 1980, O. 69 r. 4(1)(b) - Arbitration Act 1952 s. 24(2).

The plaintiff, who undertook and completed the construction of 177 units of houses for the defendant pursuant to an agreement executed on 29 February 1984, filed a suit in the High Court, Ipoh, to claim some disputed payment in respect of his work thereof. However by an order dated 6 August 1992, the High Court stayed proceedings in respect this suit and ordered the dispute to be arbitrated in line with clause 34(1) of the agreement, which provided for such arbitration. In consequence, the plaintiff wrote to the President, Persatuan Akitek Malaysia (PAM) requesting the latter to appoint an arbitrator and following that, the President of PAM, one Mr. Jimmy C.S. Lim, appointed one Mr. W.Y. Chin as arbitrator.

The defendants refused to submit to arbitration. The arbitration thus proceeded *exparte* and on 28 October 1993 the arbitrator handed down his award ordering the defendant, *inter alia*, to pay the plaintiff RM2,372,265.45 in respect of the building contract. A copy of this Arbitration Award was later served on the defendant on 2 November 1993.

In the meanwhile, on 27 October 1993, the President of FAM, one Haji Esa, wrote to both the plaintiff and the defendant informing them that the appointment of Mr. W.Y. Chin as the arbitrator was improper as Mr Jimmy C.S. Lim was not the lawful President of PAM at the material time and therefore could not lawfully exercise the relevant power of appointment.

Irrespective, the plaintiff applied to the Court by way of an originating summons for an order to enforce the award against the defendant. On 20 April 1994 the defendant affirmed an affidavit in reply and raised the issue that the award could not be enforced as the appointment of the arbitrator was void by reason of the letter of 27 October 1993 of Haji Esa aforesaid. The issues that arose were:

(1) Whether, as a matter of procedure, it was sufficient and competent of the defendant to challenge the exparte Arbitration Award by merely affirming and filing an affidavit in reply.
(2) In any case whether, in affirming its affidavit only some four months after the Arbitration Award, the defendant had run out of time to set the award aside.
(3) Whether in the circumstances of this case the said Haji Esa was estopped from disputing the authority of Jimmy C.S.Lim to appoint the said Mr. W.Y.Chin as arbitrator for the dispute.

Held:

[1] If at all the defendant wanted to challenge the said *exparte* award, they should have proceeded by way of an originating motions to a single Judge as clearly stipulated in O. 69 r. 2(1)(c) Rules of the High Court 1980. This the defendant did not do and the defendant cannot therefore be allowed to set aside the award of the arbitrator. The Court cannot exercise its discretion to cure this irregularity under O. 2 r. 1 RHC as the defendant's default was such that to have allowed their objection would have involved a mockery of the rules.

[2] By virtue of O. 69 r. 4(1)(b) RHC, the defendant had "within six weeks after the award has been made and published to the parties" to set aside the award. The Arbitration Award was made on 28 October 1993 and served on the defendant on 2 November 1993. Six weeks thereafter would bring it either to 9 December 1993 or 14 December 1993. Thus by affirming the affidavit in reply only on 20 April 1994 the defendant had clearly run out of time and consequently the defendant had no leg to stand on and this point should rightly go to the plaintiff.

[3] Haji Esa Haji Mohamed, the President of PAM, was estopped from disputing the authority of Mr. Jimmy C.S. Lim as the lawful President of PAM as the latter, by appointing Mr. W.Y. Chin as the arbitrator, had by words or conduct induced the plaintiff to believe that he (Mr. Jimmy C.S. Lim) was the lawful President of PAM. Consequently the referral to the arbitrator was perfectly in order and the defendant was bound by the award in question.

Per Curiam:

When the defendant refused to appear before the arbitrator, the defendant had in fact gone against the order of the High Court, Ipoh, and consequently may be said to be in contempt of Court.

[Application allowed].

Cases referred to:

Segar Restu (M) Sdn. Bhd. v. Wong Kai Chuan & Anor. [1993] 4 CLJ 177 ***(cit)***
S. Balakrishnan v. Khalid Aluminium Industries Sdn. Bhd. [1993] 4 CLJ 394 ***(refd)***
Camera Care Ltd. v. Victor Hasselblad Aktiebolag [1986] 1 FLTR 348 ***(refd)***
Cheng Keng Hong v. Government of the Federation of Malaya [1966] 2 MLJ 33 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 24(2), 27
The Rules of High Court 1980, O. 2 r. 1, O. 69, 2 rr. 2(1)(c), 4(1)(b)

For the plaintiff - Faizul Hilmey; M/s. W.Y. Chan & Roy
For the defendant - Faisal Mohd. Hanafiah; M/s. Faisal Azian & Co.

JUDGMENT

Hj Abdul Malik Bin Hj Ishak JC:

The plaintiff was employed as a contractor by the defendant under Articles of Agreement (exhibit "LJT1" in enclosure 3) (hereinafter referred to as "the contract") dated 29 February 1984 for the erection and completion of 177 units of single storey bungalows at Taman Long Jaafar, Jalan Raja Sulong, Kampong Boyan, Taiping, Perak at the contract price of RM8,825,060.70 (Ringgit Malaysia Eight Million, Eight Hundred And Twenty Five Thousand And Sixty, And Cents Seventy Only). The plaintiff successfully completed the project as per the contract and the Certificate of Fitness had been issued. However, certain disputes arose between the parties in regard to the quantum of payments and this prompted the plaintiff to file a Civil Suit No. 22-23-1991 in the High Court of Ipoh, Perak.

By an Order dated 6 August 1992, the High Court of Ipoh, Perak stayed the proceedings pending arbitration (see exhibit "LJT2" in enclosure 3). By letter dated 16 September 1992, the plaintiff wrote a letter to the defendant's solicitors nominating Dato' Seri Liew Whye Hone, a qualified architect, engineer and an advocate and solicitor as an arbitrator; unfortunately such nomination was rejected outright by the defendant (see exhibits "LJT3" of enclosure 3). The plaintiff then wrote a letter dated 16 November 1992 to the President (or Vice President), pertubuhan Akitek Malaysia ("PAM") (see exhibit "LJT5" in enclosure 3) and requested the latter to appoint an arbitrator in compliance with clause 34(1) of the contract. In due course, by letter dated 18 February 1993, the President of PAM, one Mr. Jimmy C.S. Lim appointed/nominated Mr. W.Y. Chin of No.16, Jalan 21/22, 46300 Petaling Jaya as arbitrator to adjudicate the dispute between the parties (see exhibit "LJT6" in enclosure 3). The Assistant Executive Secretary of PAM by letter dated 24 November 1992 requested the plaintiff's solicitors to advance payment of RM50 as administrative fee and this was duly complied as can be seen in the official receipt No. 65045 of PAM (see exhibit "LJT12" of enclosure 11). By letter dated February 18 1993 as adverted to above, Mr. Jimmy C.S. Lim as President of PAM requested the solicitors of both parties to fill the relevant forms for the appointment of an arbitrator and for each of the parties to pay RM5,000 as deposits. Only the plaintiff paid the deposit (see exhibit "LJT14" of enclosure 11) and to enable the preliminary hearing of the arbitration to get off the ground, the Assistant Executive Secretary of PAM by letter dated 20 May 1993 requested the plaintiff to pay a further sum of RM5,000 deposit on behalf of the defendant (see exhibit "LJT15" of enclosure 11). To avoid any delay, the plaintiff dutifully paid the extra RM5,000 deposit on behalf of the defendant and this was duly confirmed by a letter dated 8 June 1993 signed by the Assistant Executive Secretary of PAM enclosing therewith a receipt bearing No. 67969 (see exhibit "LJT14" of enclosure 11).

Events subsequently showed that the defendant refused to submit to arbitration and the duly appointed arbitrator in the person of Mr. W.Y. Chin conducted the arbitration in the presence of the plaintiff, the project manager and the Counsel for the plaintiff. In short, the arbitration proceeded *ex parte*. Finally, on 28 October 1993, the arbitration came to an end and handed down its award *ex parte*, the relevant parts of the award being:

> (b) In respect of the building contract, the respondent (defendant) is to pay the claimant (plaintiff) a sum of RM2,372,256.45 within twenty-one (21) days from the receipt of this Award, failing which an interest rate of 8% per annum shall be added thereon, until the date of the actual receipt of the said payment by the claimant (plaintiff), and
>
> (c) The respondent (defendant) is to pay the whole cost of this Arbitration, inclusive of the Arbitrator's fees, expenses, disbursements and PAM charges amounting to RM21,252.20.
>
> (The words in brackets added by me).

On 2 November 1993, the plaintiff through its solicitors sent letters addressed to the defendent and defendant's solicitors respectively enclosing a copy of the Arbitration Award dated 28 October 1993 by way of service on them and both of them acknowledged receipt thereof (see exhibit "LJT10" in enclosure 3). This means that the defendant had receipt of the award of the Arbitration on 2 November 1993.

The plaintiff now applies by way of an originating summons in chambers (enclosure 2) for the following prayers:

> (a) The abovenamed plaintiff be at liberty to enforce the Award dated 28 October 1993 of Mr. Chin Wai Yeong, the arbitrator appointed by Pertubuhan Akitek Malaysia in the same manner as a judgment or order to the same effect pursuant to s. 27 of the Arbitration Act 1952 and to enter Judgment in terms of the said Award against the abovenamed defendant.
>
> (b) The costs of this application and the costs of signing Judgment be taxed if not agreed and paid by the defendant to the plaintiff.
>
> (c) Further or other relief that this Honourable Court deems fit.

Abdul Aziz bin Kadir, the Secretary to the defendant affirmed an affidavit in reply on 20 April 1994 (enclosure 10) and raised only one issue, that is, that the award of the arbitration dated 28 October 1993 could not be enforced as the appointment of the arbitrator was void based on the letter dated 27 December 1993 addressed to the solicitors of both parties and

also to Mr. Chin Wai Yeong, and the relevant part of that letter reads as follows:

> Dear Sirs,
>
> Arbitration: *Lim Joo Thong v. Koperasi serbaguna Taiping Barat Bhd.*
>
> It has recently surfaced that the appointment of Mr. Chin Wai Yeong on 10 June 1993 by Mr. Jimmy C.S. Lim as the Arbitrator in the abovementioned arbitration was improper as Mr. Lim was not the lawful President of the Pertubuhan Akitek Malaysia at the material time and therefore could not lawfully exercise the relevant power of appointment.
>
> In Order to save time and costs, I respectfully suggest that you agree in writing to the appointment of Mr. Chin Wai Yeong on 10 June 1993 as Arbitrator in the above-mentioned arbitration and to all proceedings conducted by Mr. Chin since 10 June 1993 in the abovementioned arbitration, and notify PAM of such agreement. I wish to apologise for any inconvenience caused to you as a result of the above and if you have any alternative suggestions, please let me know.
>
> Your faithfully,
>
> (Signed)
> Haji Esa Haji Mohamad
> President PAM.

The very same letter was also exhibited by the plaintiff in enclosure 11, and upon receipt of this startling letter, the plaintiff through its solicitors wrote a letter couched in strong terms to PAM dated 19 January 1994. The conduct of the plaintiff was perfectly understandable and in that letter (dated 19 January 1994) the plaintiff rightly pointed out, *inter alia*, that (see exhibit "LJT17" in enclosure 11):

> It appears to us that PAM has represented Mr. Jimmy C.S. Lim to be the President of PAM at the time of appointment of arbitrator Mr. W.Y. Chin as shown by your letter dated 18 December 1993 in reply to our application to PAM which was not addressed to the said Mr. Jimmy C.S. Lim.
>
> Who was the lawful President if the said Jimmy C.S. Lim was not; and why did that lawful President not make the appointment since our application was addressed to the "President or Vice President." For that matter how are we to know whether you are or will continue to be the lawful President of PAM; or whether you are the proper authority to rule that the said Mr. Jimmy C.S. Lim was not the lawful President at the time of the appointment.

In my judgment, when the defendant refused to appear before the arbitrator in the person of Mr. W.Y. Chin and the arbitration had to proceed exparte the defendant had gone against the order of the High Court of Ipoh dated 6 August 1992 and, consequently, may be said to be in contempt of Court, though this may be the subject matter of a different exercise and at a different forum (*Segar Restu (M) Sdn. Bhd. v. Wong Kai Chuan and Anor.* [1993] 4 CLJ 177). Now, with the benefit of the letter from Haji Esa Haji Mohamed, the President of PAM, the defendant sought to strike down the *ex parte* Arbitration Award dated 28 October 1993 by merely filing an affidavit in reply in enclosure 10 which was in fact filed in an reply to the plaintiff's affidavit in enclosure 3. If at all the defendant wanted to challenge the *ex parte* Arbitration Award dated 28 October 1993, they should have proceeded by way of an originating motion to a single Judge in Court. I am fortified in my view by O. 69 r. 2(1)(c) of the Rules of the High Court 1980 ("RHC") which says that:

> 2(1) Every application to the Court
>
> (c) to set aside an award under s. 24(2) thereof, must be made by originating motion to a single Judge in Court.

Section 24(2) refers to the Arbitration Act 1952 and that section enacts that:

> 24(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

Thus, by way of procedure the defendant cannot succeed to set aside the award of the arbitrator dated 28 October 1993. I refuse to exercise my discretion cure this irregularity under O. 2 r. 1 of the RHC. I have said in *S. Balakrishanan v. Khalid Aluminium Industries Sdn. Bhd.* [1993] 4 CLJ 394 that:

> Parties to a suit or action must abide by the rules of procedure. No Court can conduct its business efficiently without a code of procedure. Those who run foul of the rules of procedure must face the consequences.

In the words of Sir Roger Ormrod in *Camera Care Ltd. v. Victor Hasselblad Aktiebolag* [1986]1 FLTR 348:

> I do not think it would be a proper exercise of the discretion for the Court to put right the egregious mistakes of the plaintiff's solicitors.

Clearly, the nature of the defendant's default was such that to have allowed their objections in enclosure 10 would have involved a mockery of the rules.

Next, when the plaintiff referred the matter of appointment of an arbitrator it was done pursuant to clause 34 of the contract which provides *inter alia:*

> ... apply to the President or Vice President for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract.

Thus, the plaintiff wrote a letter dated 16 November 1992 not to Mr. Jimmy C.S. Lim but to the President (or Vice President) of PAM and was informed by letter dated 18 February 1993 signed by Jimmy C.S. Lim, President of PAM that Mr. W.Y. Chin was appointed as an arbitrator. How was the plaintiff to know, at that material time, that Mr. Jimmy C.S. Lim was not the lawful President of PAM? Consequently, the mechanism of the hearing before the arbitrator went full steam ahead until its final conclusion on 28 October 1993 with an award being handed down exparte. In my Judgment, and it is my finding of fact that the Arbitration Award was served on the defendant and their solicitors on 2 November 1993. Thus, by virtue of O. 69 r. 4(1)(b) of the RHC, the defendant had "within 6 weeks after the award has been made and published to the parties" to set aside an award made under s. 24(2) of the Arbitration Act, 1952. The Arbitration Award was made on 28 October 1993 and 6 weeks thereafter would bring it to 9 December 1993. Further, if one were to consider that the Arbitration Award was relayed to the defendant and their solicitors on 2 November 1993, then 6 weeks thereafter would bring it to 14 December 1993. This means that defendant should by 9 December 1993 or by 14 December 1993 have filed an originathing motion to set aside the Arbitration Award. On both methods of calculations, the defendant had run out of time. Enclosure 10 was affirmed on 20 April 1994 - way beyond the period as stipulated in O. 69 r. 4(1)(b) of the RHC and, consequently, the defendant had no leg to stand on and this point should rightly go to the plaintiff.

This brings me to the next point that President of PAM in the person of Mr. Jimmy C.S. Lim by appointing Mr. W.Y. Chin as arbitrator and the Assistant Executive Secretary in enclosing the relevant receipts for administrative and deposit fees in order to start the arbitration off the ground, had by words or conduct induced the plaintiff to believe that Mr. Jimmy C.S. Lim was the lawful President of PAM and, consequently, the referral to the arbitrator was perfectly in order and the defendant was bound by the Arbitration Award of Mr. W.Y. Chin. For the same reasons, Haji Esa Haji Mohamed, the President of PAM was estopped from disputing the authority of Mr. Jimmy C.S. Lim as the lawful President of PAM. The estoppel doctrine construed in favour of the plaintiff can further be appreciated if one bears in mind that the letter of Haji Esa Haji Mohamed, President of PAM declaring Mr. Jimmy C.S. Lim as the unlawful President of PAM and, consequently, struck at the very appointment of Mr. Chin Wai Yeong as an arbitrator was dated 27 December 1993 - some one month twenty nine days (1 month 29 days) after the Arbitration Award was handed down. This time lapse would surely strengthen the sanctity of the Arbitration Award as both parties before 27 December 1993 thought that the rigmarole of arbitration as accorded by clause 34 of the contract had been performed legally without a hitch. Raja Azlan Shah J. (as His Majesty then was) in *Cheng Keng Hong v. Government of the Federation of Malaya* [1966] 2 MLJ 33 said after referring to the decision of the Privy Council in Attorney - General for *Ceylon v. A. D. De Silva* [1953] AC 461 at page 479:

> Applying the law to the present case, I find that although Hewish had no authority to sign the said letter for the Chief Architect the respondents had by their conduct represented or permitted to be represented to the applicant that Hewish had the authority to act on their behalf and consequently the respondents are bound by his acts to the same extent as if he had the authority. In the circumstances the respondents are estopped from disputing the authority of Hewish.

For the above reasons, prayers (a) and (b) of enclosure 2 of the plaintiff were allowed.